IN THE SUPREME COURT OF THE UNITED STATES

October Term 1973

No. 73-1793

BURTON MARKS,

Petitioner,

vs.

HOUSTON I. FLOURNOY, individually and in his capacity as Controller of the State of California, J. K. BAILLIE, individually and in his capacity as President of Los Angeles Federal Savings and Loan Association,

Respondents.

BRIEF OF RESPONDENTS FLOURNOY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TOPICAL INDEX

		Page
Table of Authorities		ii
STATEMENT OF THE CASE		1
PRELIMINARY ASPECTS		2
REASONS FOR DENYING THE WRIT		4
I	THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT	4
II	THERE IS NO CONFLICT AMONG THE VARIOUS CIRCUITS WHEREIN THE QUESTION OF ABSTENTION HAS BEEN CONSIDERED	8
CONCLUSION		9
APPENDIX A		

TABLE OF AUTHORITIES

Cases	Page
Alexander v. "Americans United," Inc., ___ U.S. ___, 42 U.S.L.R. 4711 (1974)	6
American Commuters Ass'n. v. Levitt, 405 F.2d 1148 (2d Cir. 1969)	8
Ammex Warehouse Co., Inc. v. Gallman, 414 U.S. 862, 94 S.Ct. 163, 39 L.Ed.2d 39 (1973 memo)	6
Bland v. McHann, 463 F.2d 21 (2d Cir. 1972) cert. den. 410 U.S. 966, 93 S.Ct. 1438, 35 L.Ed.2d 700	6, 7 8, 9
Board of Regents of State College v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972)	7
Bob Jones University v. Simon, ___ U.S. ___, 42 U.S.L.W. 4721 (1974)	6
Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)	7

Fuentes v. Shevin,
407 U.S. 67, 92 S.Ct. 1983,
32 L.Ed.2d 556 (1972) 7

Great Lakes Co. v. Huffman,
319 U.S. 293 (1943) 5, 6

Hagans v. Lavine,
___ U.S. ___, 94 S.Ct. 1372,
39 L.Ed.2d 577, 42 U.S.L.W. 438
(1974) 4

Hickman v. Wujick,
488 F.2d 875 (2d Cir. 1973) 8

Lynch v. Household Finance Corporation,
405 U.S. 538, 92 S.Ct. 1113 (1972) 7

Matthews v. Rogers,
284 U.S. 521, 52 S.Ct. 217,
76 L.Ed. 447 (1932) 7

Mitchell v. W. T. Grant Co.,
___ U.S. ___, 42 U.S.L.W. 4671
(1974) 7

Perez v. Ledesma,
401 U.S. 82, 91 S.Ct. 674,
27 L.Ed.2d 697 (1971) 7

Phillips v. Commissioner,
283 U.S. 589, 51 S.Ct. 608,
73 L.Ed. 1289 (1931) 7

Samuels v. Mackell,
401 U.S. 66, 91 S.Ct. 764,
27 L.Ed.2d 658 (1971) 5

Scheuer v. Rhodes,
___ U.S. ___, 94 S.Ct. 1683,
40 L.Ed.2d 90, 42 U.S.L.W. 4543
(1974) 4

Steffel v. Thompson,
___ U.S. ___, 94 S.Ct. 505,
39 L.Ed.2d 1209, 42 U.S.L.W. 4357
(1974) 4, 5

United States v. State Tax Commissioner,
481 F.2d 963 (1st Cir. 1973) 8

Walker v. Gilligan,
487 F.2d 508 (6th Cir. 1973) 8

Statutes

California Revenue and Taxation Code
Sections 14301, 14308, 14341,
14345 and 14348 3

28 U.S.C. §1341 2, 3, 4
5, 6, 8

IN THE
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OF THE UNITED STATES
October Term 1973
No. 73-1798

BURTON MARKS,

Petitioner,

vs.

HOUSTON I. FLOURNOY, individually and in his capacity as Controller of the State of California, J. K. BAILLIE, individually and in his capacity as President of Los Angeles Federal Savings and Loan Association,

Respondents.

BRIEF OF RESPONDENTS FLOURNOY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

This case involves the applicability of the doctrine of federal court abstention from

hearing cases involving state tax collection procedures where there is a plain, speedy and efficient remedy at law in the state courts.

The gravamen of the complaint is that plaintiff-petitioner's civil rights were infringed upon by virtue of the fact that under the California Inheritance Tax Law certain restraints are placed upon withdrawal of funds by the survivor to a joint tenancy bank account. (See, Appellees' Brief (Flournoy), p. 2.)

Petitioner's statement of Jurisdiction (Petition for Writ, p. 2) adequately sets forth the chronological sequence of events leading to his petition to this Court. In each instance the question is presented in terms of the jurisdiction of the District Court to hear the complaint.

A summary of respondents' position below is found in the brief filed with the Court of Appeals (Appellees' Brief, pp. 4-5).

PRELIMINARY ASPECTS

The statement of the Questions Presented and of the Statutes and Constitutional Provisions Involved as recited by petitioner (Petition for Writ, p. 3) fails to refer to or cite 28 U.S.C. §1341, which was relied upon by the District Court in its order and likewise fails to mention that the basic

issue is the application of the doctrine of federal court abstention from interfering with state tax collection procedures which was the basis for both the District Court and the Court of Appeals decisions. (The text of 28 U.S.C. §1341 is set forth in Appendix "A".)

Petitioner's Statement of Fact (Petition for Writ, pp. 3-4) fails to recite that the "policies and practices" alluded to are authorized by Sections 14301, 14308, 14341, 14345 and 14348, California Revenue and Taxation Code (set forth in Appendix "A"), as part of a comprehensive scheme for securing the reporting of assets transferred and for assessment and collection of California Inheritance Tax which may be due on such transferred assets. Petitioner's Statement likewise fails to indicate and the record below demonstrates that no showing nor even an offer of proof was made by petitioner that there is no plain, speedy or efficient remedy at law in the courts of the State of California.

REASONS FOR DENYING THE WRIT

I

THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT

Petitioner's brief merely recites the same arguments used unsuccessfully by him in the courts below, but to invite this Court's attention he cites three new cases decided by this Court, all of which are both factually and legally distinguishable from this case, and one of which, Steffel v. Thompson, ___ U.S. ___, 94 S.Ct. 1209, 39 L.Ed.2d 505, 42 U.S.L.W. 4357 (1974) suggests that this Court clearly approves of the conceptual and statutory bases for abstention in the area of state tax collections.

Scheuer v. Rhodes, ___ U.S. ___, 94 S.Ct. 1683, 40 L.Ed.2d 90, 42 U.S.L.W. 4543 (1974) involved the claim of executive immunity from tort liability, and Hagans v. Lavine, ___ U.S. ___, 94 S.Ct. 1372, 39 L.Ed.2d 577, 42 U.S.L.W. 438 (1974) dealt with procedural aspects of the administration of the Aid to Families with Dependent Children program in New York. Nowhere in either of these cases is the question of state tax lien laws mentioned nor do they discuss or even cite 28 U.S.C. §1341 or the abstention doctrine.

In Steffel v. Thompson, ___ U.S. ___, 94 S.Ct. 1209, 39 L.Ed. 505, 42 U.S.L.W. 4357, this Court sustained the jurisdiction of the federal courts to entertain suits for declaratory relief against anticipated prosecutions, where there was no pending state criminal proceeding. In discussing the scope of the policies considered, this Court mentions the reasoning behind the denial of federal jurisdiction in certain areas:

> "The only cases where this Court has disregarded the 'different considerations' and found that a preclusion or injunctive relief inevitably led to a denial by declaratory relief have been cases in which principles of federalism militated altogether against federal intervention into a class of adjudications. (See Great Lakes Co. v. Huffman, 319 U.S. 293 (1943) (federal policy against interfering with the enforcement of state tax laws) . . . ."
> ___ U.S. ___. 94 S.Ct. 1209 at 1222, 39 L.Ed. 505, 522.

In the footnote following this quotation this Court discusses the Great Lakes case and cites 28 U.S.C. §1341 (___ U.S. ___, 39 L.Ed. 505, 552, fn. 20). Also see, Samuels v. Mackell, 401 U.S. 66, 91 S. Ct. 764, 27 L.Ed.2d 658 (1971).

In Bland v. McHann, 463 F.2d 21 (2d Cir. 1972) cert. den. 410 U.S. 966, 93 S.Ct. 1438, 35 L.Ed.2d 700, the Court of Appeals relies primarily upon the Great Lakes case in sustaining the dismissal of suits in federal courts which directly or indirectly attempt to interfere with state tax collection procedures.

This Court has affirmed, in one reported case, that 28 U.S.C. §1341 requires dismissal of a suit for declaratory judgment, even where the constitutional challenge appears to be meritorious, where the state court procedure appears to provide a plain, speedy and efficient remedy. Ammex Warehouse Co., Inc. v. Gallman, 414 U.S. 862, 94 S.Ct. 163, 39 L.Ed.2d 39 (1973 memo).

Petitioner's suggestion that his suit for damages does not "enjoin, suspend or restrain assessment, collection of any tax under state law," is spurious, since to sustain his claim for relief would require a holding that the inheritance tax lien procedures are invalid, which in itself would interfere with the entire process of reporting and jeopardize the security for payment of California inheritance taxes. Petitioner's argument is quite similar to those which were rejected by this Court in Bob Jones University v. Simon, ___ U.S. ___, 42 U.S.L.W. 4721 at 4725 (1974) and Alexander v. "Americans United," Inc., ___ U.S. ___, 42 U.S.L.W. 4711 at 4714 (1974), where

taxpayers tried unsuccessfully to circumvent a similar statutory preclusion in the Internal Revenue Code. Also see, Bland v. McHann, supra, at 25-28 citing Matthews v. Rogers, 284 U.S. 521, 52 S.Ct. 217, 76 L.Ed. 447 (1932).

The three cases cited by Petitioner regarding his alleged constitutional rights (Petition for Writ, p. 7) are inapplicable for the reasons suggested in several opinions by this Court, all of which rely upon Phillips v. Commissioner, 283 U.S. 589, 51 S.Ct. 608, 73 L.Ed. 1289 (1931), which was relied upon in Mitchell v. W. T. Grant Co., ___ U.S. ___, 42 U.S.L.W. 4671, 4675 (1974). See, Perez v. Ledesma, 401 U.S. 82, 126-127, n. 17, 91 S.Ct. 674, 678, 27 L.Ed.2d 697-698, 701 (1971, Brennan, J. concurring); Lynch v. Household Finance Corporation, 405 U.S. 538, 542-543, n. 6, 92 S.Ct. 1113 at 1117, n. 6 (1972); Fuentes v. Shevin, 407 U.S. 67, 91-92, n. 24, 92 S.Ct. 1983, 1991-2000, n. 24, 32 L.Ed.2d 556, 576, n. 24 (1972); also see comments of this Court in Boddie v. Connecticut, 401 U.S. 371 at 378-379, 91 S.Ct. 780, 786-787, 28 L.Ed.2d 113, 119-20 (1971); Board of Regents of State College v. Roth, 408 U.S. 564, 570, n. 7, 92 S.Ct. 2701, 2705 (1972).

II

THERE IS NO CONFLICT AMONG THE VARIOUS CIRCUITS WHEREIN THE QUESTION OF ABSTENTION HAS BEEN CONSIDERED

In each of the following decisions by the Court of Appeals, the abstention doctrine and 28 U.S.C. §1341 have been applied in the absence of a showing of a lack of a plain, speedy and efficient remedy in state court:

American Commuters Ass'n. v. Levitt,
405 F.2d 1148 (2d Cir. 1969);

Hickman v. Wujick,
488 F.2d 875 (2d Cir. 1973);

Walker v. Gilligan,
487 F.2d 508 (6th Cir. 1973);

United States v. State Tax Commissioner,
481 F.2d 963, at 972-74
(1st Cir. 1973);

Bland v. McHann,
463 F.2d 21 (5th Cir. 1972)
cert. den. 410 U.S. 966,
93 S.Ct. 1438, 35 L.Ed.2d 700
(1973).

It is appropriate that the Court of Appeals decision herein relies upon Bland v. McHann,

supra, since that opinion contains the most complete analysis of the abstention doctrine, as to both its statutory and its caselaw bases. Petitioner's brief in no way considers or attempts to contrast Bland or to discuss the abstention doctrine at all, even though the decisions of the District Court and the Court of Appeals were directed specifically to this point.

CONCLUSION

As was suggested below, the restraint placed upon petitioner's access to the joint tenancy account is due to the enforcement and collection procedures under the California Inheritance Tax Law. The complaint filed herein challenges the validity of the state tax collection procedure, and since there was no showing of a lack of plain, speedy and efficient remedy in the courts of the State of California, the suit was properly dismissed by the trial court.

Petitioner's brief has advanced no reason which would bring this case outside of the rule of federal court abstention, and in fact one of his cited authorities lends support to the correctness of the District Court and Court of Appeals decisions.

It is respectfully submitted that this Court should deny the writ of certiorari.

Respectfully submitted,

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APPENDIX A

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. §1341.

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State Law where a plain, speedy and efficient remedy may be had in the courts of such State.

§14301, California Revenue and Taxation Code.

Every tax imposed by this part, together with any interest on the tax, is a lien upon the property included in the transfer on which the tax is imposed. Except as otherwise provided in this chapter, the lien remains until the tax and interest are paid in full.

§14308, California Revenue and Taxation Code.

The Controller, the inheritance tax attorney or a subordinate inheritance tax attorney may at any time release all or any portion of the real property subject to any lien imposed by this part from such lien or subordinate such lien to other liens and encumbrances if he determines that the taxes are sufficiently secured by a lien on other property belonging to the decedent at the time

of his death or that the release or subordination of such lien will not endanger or jeopardize the collection of said taxes.

A certificate by the Controller, the inheritance tax attorney, or a subordinate inheritance tax attorney to the effect that real property subject to any lien imposed by this part has been released from such lien or that the lien imposed by this part on any property or interest therein has been released or subordinated to other liens as in this section provided shall be conclusive evidence as to any bona fide purchaser, encumbrancer or lessee that such lien has been subordinated as set forth in the certificate.

§14341, California Revenue and Taxation Code.

Unless the written consent of the Controller, or of a person authorized in writing by the Controller to issue the consent, is first secured, no corporation organized or existing under the laws of this State shall transfer on its books or issue a new certificate for any share of its capital stock belonging to or standing in the name of a decedent, belonging to or standing in the joint names of a decedent and one or more other persons, or held in trust for a decedent.

§14345, California Revenue and Taxation Code.

No safe deposit company, trust company, corporation, bank, other institution, or person in possession, control, custody, partial control, or partial custody of any securities, deposits, or other property, including shares of the capital stock of or other interest in any such organization or institution, belonging to or standing in the name of a decedent, whether resident or non-resident, shall deliver or transfer any such property to or upon the order or request of any executor of the will, administrator of the estate, legatee or heir of the decedent; nor deliver or transfer any such property to or upon the order of any agent, deputy, attorney, trustee or successor in interest of the decedent after receipt of actual notice of the death of decedent; nor deliver or transfer any securities or other property, including any shares of the capital stock or other interest in any such organization or institution, standing in the joint names of the decedent and one or more other persons, to or upon the order or request of such other person or persons after receipt of actual notice of the death of the decedent; and no bank or other institution having custody of any deposit standing in the joint names of a decedent and any other person or persons or standing in the name of the decedent subject to the right of any other person or persons to draw upon or withdraw the same shall pay or deliver such deposit to or upon the order of such other person or persons after receipt of actual notice

of the death of the decedent by the officer or manager in charge of the office or branch of such bank or other institution at which such deposit is carried or by the employee thereof who pays or delivers said deposit:

(a) Without retaining a sufficient portion or amount of the property to pay any tax and interest which may thereafter be assessed pursuant to this part; and

(b) Without first giving notice of the time and place of the delivery or transfer to the Controller and county treasurer at least 10 days prior to the delivery or transfer.

The Controller, or any person authorized in writing by the Controller, may consent in writing to the delivery or transfer, in which event compliance with this section is not required.

The Controller or his authorized agent may examine any property specified in this section at the time of its delivery or at any other time.

§14348, California Revenue and Taxation Code.

When in the opinion of the Controller, collection of the tax imposed by this part will not thereby be jeopardized, he may in such classes of cases as he shall determine, and subject to such conditions as he shall impose,

issue general consents or dispense with the requirements of this article that his written consent be obtained prior to the delivery or transfer of stocks, securities, accounts, deposits or other property belonging to or standing in the name of a decedent.